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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JACOB MANDEL, et al.

Plaintiffs,

vs.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, SAN FRANCISCO STATE UNIVERSITY, et al.,

Defendants.

CASE NO. 3:17-cv-03511-WHO

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY; LESLIE WONG; MARY ANN BEGLEY; LUOLUO HONG; LAWRENCE BIRELLO; REGINALD PARSON; OSVALDO DEL VALLE; KENNETH MONTEIRO; BRIAN STUART; ROBERT NAVA; MARK JARAMILLA; VERNON PICCINOTTI; AND SHIMINA HARRIS

Judge: Hon. William Orrick III
Dept: Courtroom 2, 17th Floor
Date: November 8, 2017
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I. INTRODUCTION

Plaintiffs' Opposition ("Opp.") demonstrates that all of their claims should be dismissed with prejudice. As to their First Amendment claims, Plaintiffs do not meaningfully dispute either that Defendants cannot be held liable for failing to prevent third parties' interference with Plaintiffs' rights or that Defendants could not, consistent with other students' First Amendment rights, have responded to the events alleged in the Complaint in the ways Plaintiffs allege they should have. (Opp. 12-13.) As to their equal protection claims, Plaintiffs now assert that, although the word "race" does not appear in the FAC, they claim Defendants discriminated against them on the basis of their race. (*Id.* 1-2.) But Plaintiffs' equal protection claims fail as a matter of law—whether based on religion, ethnicity, or race—because Plaintiffs have not alleged a fundamental element of such a claim: disparate treatment in materially similar circumstances. As to Plaintiffs' Title VI claim, Plaintiffs wrongly characterize the argument that Defendants were not permitted to infringe other students' First Amendment rights as an "affirmative defense." (*Id.* 21.) Under Title VI, "[a] recipient [of federal funds] cannot be directly liable for alleged indifference where it lacks the authority to take remedial action." *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 (1999). To state a Title VI claim, therefore, Plaintiffs must allege, at a minimum, that Defendants failed to take remedial action that it could lawfully have taken. Plaintiffs' Title VI claim fails for the additional reasons that they concede it is based on only a few incidents of alleged harassment and that Plaintiffs have not sufficiently alleged that they have been deprived of educational opportunities or benefits. (Opp. 22-23.)

This is Plaintiffs' second attempt to plead these claims against Defendants. Because Plaintiffs' theories fail as a matter of law, the Court should dismiss them with prejudice.

II. ARGUMENT

A. Plaintiffs fail to state claims against the individual Defendants in their personal capacities.

Plaintiffs wrongly claim that "Defendants seemingly contend that *each* of the six causes of actions [sic] in the FAC should be dismissed both for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6)." (Opp. 1.) But Defendants

contend only that Plaintiffs' federal constitutional claims against the University and their claims for damages against the individual Defendants in their official capacities are barred by the Eleventh Amendment. (Mot. 7-8.) As Plaintiffs argue, (Opp. 6-7), individual officials may of course sometimes be sued in their personal capacities, but these defendants have not been effectively sued in that capacity, because Plaintiffs' personal-capacity claims lack any supporting factual allegations. In *Hafer v. Melo*, the case on which Plaintiffs rely to suggest that their mere "references" to personal capacity "suffice," (Opp. 6-7), the Supreme Court expressly stated that "the distinction between official-capacity suits and personal-capacity suits is more than a mere pleading device." 502 U.S. 21, 27 (1991) (internal quotation marks omitted).

Accordingly, "[t]o state a claim against state officials in their individual capacities, the complaint must set forth allegations from which the court can infer that the individuals acted in their individual capacities." *Peralta v. Cal. Franchise Tax Bd.*, 124 F. Supp. 3d 993, 1001 (N.D. Cal. 2015) (citing *Scott v. Cal. State Lotto*, 19 F.3d 1441 (9th Cir. 1994)). A plaintiff "is required to plead specific facts regarding each individual Defendant's conduct sufficient to plausibly state a cause of action against that Defendant individually." *Clark v. Ca. Dep't of Forestry & Fire Prot.*, 212 F. Supp. 3d 808, 815 (N.D. Cal. 2016). To determine whether a defendant is properly sued in her personal capacity, "the court must examine the specifics of the conduct involved and not merely look at the caption of the complaint." *Peralta*, 124 F. Supp. 3d at 1001 (internal quotation marks omitted).

Even a cursory review of the FAC shows that Plaintiffs have not pleaded specific facts plausibly to state claims against the individual Defendants in their personal capacities. Indeed, as Defendants have previously explained, as to some individual Defendants, Plaintiffs allege at most one to two sentences about each of them. (Mot. 15-16.) Just one example suffices to demonstrate that Plaintiffs' real issue is with the actions of the University as a whole, not with individual defendants in their personal capacities: "[Plaintiffs'] rights of free speech, association, and religious expression were infringed upon *by SFSU's* coercion and intentional exclusion of Hillel from the 'Know Your Rights' Fair." (FAC ¶ 142 (emphasis added).) That Plaintiffs add as an afterthought conclusory allegations that all of the individual Defendants "are each responsible for

coordinating and managing student events such as the 'Know Your Rights' Fair" and "allowed the admitted intentional discrimination of exclusion of Hillel to occur" is plainly insufficient plausibly to show that each individual Defendant's actions *independently* constituted a violation of each Plaintiff's constitutional rights. (*Id.* ¶ 143.); *see Clark*, 212 F. Supp. 3d at 815; *Peralta*, 124 F. Supp. 3d at 1001.

B. Plaintiffs' First Amendment claims fail as a matter of law.

1. Plaintiffs waited until their Opposition to state their First Amendment claims clearly.

Plaintiffs admonish Defendants for "devot[ing] more than a page of their brief to attacking phantom Free Exercise claims that are wholly absent from the FAC." (Opp. 2.) But Plaintiffs' FAC repeatedly references Plaintiffs' religion and asserts that Defendants "deprived and continue to deprive Plaintiffs of their First Amendment rights, *including but not limited to* the right to assemble, the right to listen or the right to hear." (FAC ¶¶ 174, 203 (emphasis added).)[1] In light of Plaintiffs' open-ended claims and allegations, Defendants had no choice but to address every possible First Amendment theory Plaintiffs might be advancing. Only in their Opposition do Plaintiffs clarify that they are asserting only association and assembly claims.

2. The Court may properly look to documents on which Plaintiffs rely in their FAC under the incorporation-by-reference doctrine.

The Court may properly consider the entirety of Professor Abdulhadi's blog post on which Plaintiffs rely in their FAC. Under the incorporation by reference doctrine, [a court may] "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (internal quotation marks omitted); *see also United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim."); *Gerritsen v. Warner*

[1] Indeed, it is ironic that Plaintiffs assail Defendants for addressing a Free Exercise claim, even though the FAC repeatedly mentions "religion," while also assailing Defendants for failing to address discrimination on the basis of race, even though the FAC does not use the word "race" even once.

Bros. Entm't Inc., 116 F. Supp. 3d 1104, 1119 (C.D. Cal. 2015) ("Defendants, however, do not assert that these documents, in isolation, are the only materials on which [plaintiff] relies; they merely request that the court consider the entirety of the documents, which they assert [plaintiff] 'handpicked' to cite in her first amended complaint."). Plaintiffs do not contest the authenticity of the document; they simply want to rely on carefully selected parts of it. The Court may and should consider the entirety of the blog post.

3. Failure to protect an individual's First Amendment rights from infringement by third parties is not a basis for constitutional liability.

The crux of Plaintiffs' First Amendment claims are allegations about the constitutionally protected activities of third parties, and Plaintiffs' opposition confirms that fundamental point. Plaintiffs have no answer to the legal argument that a First Amendment claim must be premised on governmental action and not on the government's failure to prevent independent actions by private parties. Following the reasoning of the Supreme Court's decision in *DeShaney ex rel. DeShaney v. Winnebago County Department of Social Services*, in which the Court held that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," 489 U.S. 189, 195 (1989), courts have held that a First Amendment claim may not be premised on the actions of third parties. *See Citizens for Health v. Leavitt*, 428 F.3d 167, 185 (3d Cir. 2005) ("[Plaintiffs'] First Amendment claim fails . . . [because] the potential 'chilling' of patients' rights to free speech derives not from any action of the government, but from the independent decisions of private parties."); *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 692 (7th Cir. 2005); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1513 (11th Cir. 1992); *Felber v. Yudof*, 851 F. Supp. 2d 1182, 1186 (N.D. Cal. 2011) ("[E]ven assuming that plaintiffs have alleged, or could amend to allege, sufficient acts of harassment and intimidation directed against them based on their religion to be deemed as an interference with their free exercise of that religion, they simply have no basis for pursuing such constitutional claims against defendants. With exceptions not implicated here,

state actors have no constitutional obligation to prevent private actors from interfering with the constitutional rights of others.").[2]

Instead, Plaintiffs argue that their allegations are not in fact based on third-party conduct. (Opp. 12-13.) Plaintiffs' argument that Defendants' order to "stand down" is an "affirmative" act is wrong. They use a semantic trick, attempting to transform an alleged decision by Defendants not to prevent others from interfering into affirmative interference by the Defendants themselves. (*Id*. 3.) That trick, if allowed, would swallow the *DeShaney* rule whole. Whenever government actors fail to protect individuals from third-party interference with their rights, some government official arguably has decided not to do so. If *DeShaney*'s rule could be avoided simply by characterizing such a decision not to act as "affirmative," the Supreme Court's opinion would become an irrelevance. Indeed, were Plaintiffs here correct, in *DeShaney* itself the plaintiff could have avoided the rule simply by alleging, not just that the Department of Social Services failed to protect him from abuse by his father, but that the agency "affirmatively decided" not to do so. *See DeShaney*, 489 U.S. at 191-193.

That leaves Plaintiffs with two allegations of affirmative conduct by Defendants—the decision to move the Mayor Barkat event and the exclusion of Hillel from the Know Your Rights Fair. For the reasons set forth below, neither is sufficient to state a First Amendment claim.

4. Plaintiffs have not alleged any unconstitutional burden on their right peaceably to assemble or to associate with others in protected activities.

As a threshold matter, Plaintiffs misleadingly claim that Defendants have conceded Plaintiffs' freedom-of-assembly claim based on the Know Your Rights Fair and freedom-of association-claim based on the Mayor Barket Event. (Opp. 7-8, 9-10.) They are wrong. First, where Defendants have stated that Plaintiffs' association and assembly claims fail, they have clearly cited to the portions of the FAC about both the Mayor Barkat Event and the Know Your

[2] Plaintiffs also do nothing to refute the principles that a school must balance the First Amendment rights of students against preservation of the educational process and that the First Amendment protects all student speech unless it will "'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 766 (9th Cir. 2006) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

Rights Fair. (Mot. 9, 10.) Second, it is Plaintiffs who have failed clearly to tie their factual allegations to their legal claims. In their allegations concerning the Know Your Rights Fair, for example, Plaintiffs do not even mention the word "assemble." (FAC ¶¶ 142-163.) And, in the allegations concerning the Mayor Barkat event, Plaintiffs do not even mention the word "associate." (*Id.* ¶¶ 61-93.) Plaintiffs' own descriptions of the rights at issue are inconsistent—at times, they are rights of "free speech, association, and religious expression," (*id.* ¶ 142); at other times, they are rights "to engage in dialogue or receive information," (*id.* ¶ 151); at yet others, they are rights "to listen, engage, and assemble." (*Id.* ¶ 93.) It is not Defendants' burden to guess which of Plaintiffs' allegations they think support which claims.

In any event, Plaintiffs' two allegations of affirmative actions by Defendants fail to state assembly and association claims as a matter of law. As Defendants have explained more extensively in their Motion, these allegations do not rise to the level of a substantial burden on Plaintiffs' rights to assemble and associate. (Mot. 9-11); *see Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-623 (1984); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1033 (9th Cir. 2004). With respect to the Mayor Barkat event, Plaintiffs point to allegations of references by two individual Defendants to "powder kegs," a "lit fuse," and "a controversial speaker." (Opp. 9.) Even assuming such statements could reasonably be construed to be about the content or viewpoint of the event, the *motivation* for moving the event was, according to Plaintiffs' own allegations, to minimize the impact on classes in the middle of the day—a content-neutral consideration motivated by practical considerations and not by disagreement with a message. *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) (concluding that ordinance was content neutral and did not burden the right to assembly, reasoning that "to the extent that the [ordinance] incidentally regulates speech or assembly within churches, such regulation is motivated not by any disagreement . . . with the message conveyed by church speech or assembly, but rather by such legitimate, practical considerations as the promotion of harmonious and efficient land use"); *see also Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656-57 (10th Cir. 2006) (same).

Similarly, for the reasons explained more fully below in the equal protection context, Plaintiffs have failed to show that Defendants' alleged exclusion of Hillel from the Know Your Rights Fair was an attempt to "withhold benefits from [Plaintiffs] because of their membership in a disfavored group." *U.S. Jaycees*, 468 U.S. at 622.

C. Plaintiffs' equal protection claims fail as a matter of law.

Plaintiffs' attempt to salvage their equal protection claims is equally unavailing. They state, for the first time in their Opposition, that when they refer to Jewish "identity and beliefs" they mean race, ethnicity, and religion. (Opp. 1-2.) Once again, Plaintiffs have waited until their Opposition to state their claims with clarity (the FAC does not use the word "race," for example). Regardless whether they allege discrimination based on religion, ethnicity, or race, Plaintiffs have failed to allege disparate treatment, which is fatal to their equal protection claims. Indeed, Plaintiffs' shifting terminology to describe the alleged protected class illustrates why they have not met the threshold step in equal protection analysis: they cannot identify Defendants' alleged classification of groups, composed of persons sharing particular characteristics, such that the factor motivating the alleged discrimination can be identified.

1. Plaintiffs have not alleged that they were treated differently from others in materially similar circumstances.

Plaintiffs' Opposition does nothing to show they have satisfied the requirement that, "[t]o state a § 1983 claim for violation of the Equal Protection Clause a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff *based upon membership in a protected class*." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166 (9th Cir. 2005) (internal quotation marks omitted) (emphasis added). Plaintiffs assert in conclusory terms that "[t]he FAC has myriad allegations that Defendants intentionally discriminated against Plaintiffs as Jews, a protected class on grounds of race and religion." (Opp. 14.) But Plaintiffs have failed to identify any facts alleged in the FAC showing that Defendants' acted *differently* in circumstances similar to the Mayor Barkat Event and Know Your Rights Fair but involving individuals who do not share Plaintiffs' Jewish identity. Of course a school's discrimination against one group does not cure a school's discrimination against another group; nor does a

school's "overdiscrimination" cure discrimination. (*Id.* 14-15.) But here Plaintiffs have failed to show discrimination at all. They have not pointed to specific allegations that other groups that hosted events similar in all material respects to the Mayor Barkat event requested space in a campus classroom and were granted, rather than denied, that request; or that other groups hosted similar events in an off-campus location, with comparable competing protests, and that campus police acted differently. (FAC ¶¶ 61-122, 142-163.)

Nor have Plaintiffs pointed to specific factual allegations in their account of the Know Your Rights Fair that show they were excluded from participating *because* of their Jewish identity. In fact, non-Jewish groups were *also* excluded from the Fair. (FAC ¶ 151.) And, even if *every* student group other than Hillel had been allowed a table at the fair, given that other Jewish groups were there, Plaintiffs' allegations would still not support the inference that Hillel was excluded because of its Jewish identity. Once again, the FAC's failure to allege facts showing disparate treatment in materially similar circumstances is fatal to Plaintiffs' equal protection claim. *See Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003) ("To state a claim for violation of the Equal Protection Clause, a plaintiff must show that the defendant acted with an intent or purpose to discriminate against him based upon his membership in a protected class."); *Herguan Univ. v. Immigration & Customs Enf't*, No. 16-CV-06656-LHK, 2017 WL 2797860, at*15 (N.D. Cal. June 28, 2017) (dismissing a Chinese-owned university's Equal Protection claim with prejudice because the plaintiff failed to "allege that any non-Chinese-owned universities were similarly situated to Plaintiff or were treated differently").

D. Plaintiffs have failed to state a Title VI claim.

Plaintiffs' attempt to salvage their Title VI claim also fails. As an initial matter, Plaintiffs' contention that Defendants do not address Plaintiffs' theory of direct discrimination under Title VI is a red herring, as the bar for alleging intentional discrimination is the same as under the Equal Protection clause, and Plaintiffs have failed to meet that bar for the reasons described above. *See, e.g., Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 700-02 (9th Cir. 2009). As for the true substance of Plaintiffs' Title VI claim—deliberate indifference—Plaintiffs wrongly contend that Defendants' argument that they cannot be liable

under Title VI for allowing other students to engage in First Amendment protected activities is an "affirmative defense." (Opp. 21.) To the contrary: to state a Title VI claim, Plaintiffs must allege, at a minimum, that Defendants failed to do something they could lawfully have done; as explained below, it cannot be "deliberate indifference" to fail to violate the constitutional rights of other students. Moreover, Plaintiffs concede that most of their FAC is merely "background" and that their Title VI claim is based on only a few incidents of harassment. (*Id.* 22-23.) As a matter of law, that is insufficient to state a claim under Title VI. *See Felber*, 851 F. Supp. 2d at 1187-88.

1. A Title VI claim cannot be based on the theory that SFSU should have infringed other students' First Amendment rights.

The Supreme Court has made clear that an entity receiving federal funds may be liable for acts committed by third parties "only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action." *Davis*, 526 U.S. at 644. Accordingly, "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Id.* at 649. Here, the University lacked authority to discipline other students for exercising their right to engage in protected speech.

Plaintiffs' Opposition does not contend with the weight of the case law cited in Defendants' Motion holding that the freedom to express opposing viewpoints is especially important in the university setting. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 180 (1972); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). "[C]ore principles of the First Amendment acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission." *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (internal quotation marks omitted). Nor have Plaintiffs explained why other students' alleged First Amendment activities, even if hateful or offensive, are not protected speech. (FAC ¶¶ 72 (alleging that protestors chanted "[g]et the fuck off our campus," "Palestine will be free," and "we don't want your racist war"), 79 (alleging that protestors wore keffiyehs), 123 (op-ed in student newspaper; demonstrations at pro-Israel

student rally; speech on campus), 127 (organized rally) & 128, 129, 133 (social media posts).) And, in the face of the authorities cited in the Motion, Plaintiffs cite *no* case for the proposition that these students' speech-related activities were unprotected "true threats." (Opp. 20.)

2. Plaintiffs have not alleged facts sufficient to state a claim that Defendants were deliberately indifferent to harassment that was severe, pervasive, or objectively offensive.

Plaintiffs concede Defendants' argument that incidents that occurred long ago, were not witnessed by Plaintiffs, and were not similar to actions Plaintiffs personally experienced cannot support their Title VI claim, explaining that extensive discussion of those in the FAC is just "background" and "context." (Opp. 22.) Accordingly, the only allegations that form the basis of Plaintiffs' Title VI claim are that another student group, GUPS, threatened to pull out of the Know Your Rights Fair if Hillel were included, (FAC ¶¶ 149, 161); that some Plaintiffs felt threatened by other students' conduct at the Mayor Barkat event, (*id.* ¶¶ 8, 25); that the day after the Mayor Barkat event Plaintiff Volk felt sufficiently threatened by a member of GUPS in one of his classes that he was unable to concentrate and had to leave midway through class, (*id.* ¶ 99); that Plaintiffs Mandel and Volk "routinely experienced a similar inability to focus, concentrate, and fully participate in class," (*id.*); that Plaintiff Mandel "has missed class due to concerns about his physical safety," (*id.* ¶ 120); and that the University took three weeks to make a statement after the Mayor Barkat event and six months to issue its report about the Know Your Rights Fair.[3] These allegations are plainly insufficient to satisfy Plaintiffs' burden of showing that the University was "deliberately indifferent to [discrimination], of which [the school] ha[d] actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650.

[3] Plaintiffs once again misleadingly cite to the FAC when they claim that they have alleged that the harassment "has caused them to miss class, be threatened on the way to class, hide their Jewish identity by not wearing Stars of David or yarmulkes on campus, take alternate, circuitous routes throughout campus, and avoid certain classes altogether." (Opp. 22-23 (citing FAC ¶¶ 60, 99, 120, 141).) Paragraphs 120 and 141 contain no such allegations. Paragraph 60 contains no allegations specific to these Plaintiffs—only to the general "background" that Plaintiffs now correctly disavow as a basis for their Title VI claim. Paragraph 99, as Defendants have acknowledged in both their Motion and this Reply, is the one paragraph that contains allegations about Plaintiffs' missing class.

As to harassment that is severe, pervasive, and objectively offensive, a few incidents involving even pointed singling out of the plaintiff are insufficient to rise to the requisite level of severity and pervasiveness. *See, e.g.*, *Morgan ex rel. R.M. v. Town of Lexington*, 823 F.3d 737, 745 (1st Cir. 2016); *Wolfe v. Fayetville Sch. Dist.*, 648 F.3d 860, 866-67 (8th Cir. 2011); *Hendrichsen v. Ball State Univ.*, 107 F. App'x 680, 685 (7th Cir. 2004). Even interpreting (wrongly) the alleged conduct of the other students related to the Know Your Rights Fair and Mayor Barkat event as harassment toward Plaintiffs, as opposed to protected conduct, they do not constitute harassment sufficiently pervasive to violate Title VI. *See Davis*, 526 U.S. at 652-53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have [the systemic effect of denying the victim equal access to an educational program or activity] we think it unlikely that Congress would have thought such behavior sufficient to rise to this level.").

Moreover, the alleged conduct must be objectively severe and pervasive such that a reasonable person would agree that it is harassment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). A reasonable person would not believe that criticism of Israel is harassment at all, let alone harassment of Jewish students for being Jewish. *See Finkelshteyn v. Staten Island Univ. Hosp.*, 687 F. Supp. 2d 66, 71, 78, 82 (E.D.N.Y. 2009) (finding anti-Israel comments not to support a claim of harassment or discrimination).

As to deliberate indifference, the test is "'whether a reasonable fact-finder could conclude that the [school]'s response was clearly unreasonable in light of the known circumstances.'" *Doe v. Willits Unified Sch. Dist.*, 473 F. App'x 775, 775-76 (9th Cir. 2012) (quoting *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006)). "To meet this high standard there must, in essence, be *an official decision not to remedy the violation and this decision must be clearly unreasonable*." *Id.* (citing *Davis*, 526 U.S. at 649) (emphasis added). A showing of heightened negligence is insufficient. *Id.*

Plaintiffs' Opposition does not even attempt to point out allegations showing that Defendants' response to the alleged discrimination was clearly unreasonable. By Plaintiffs' own

admission, SFSU *did* respond to Plaintiffs' complaints about the Mayor Barkat event and the Know Your Rights Fair by conducting thorough investigations and issuing reports that explained the University's findings and actions. (FAC ¶¶ 73, 76, 84, 94-95, 111-113, 157-159.) That it took the University some time to conduct the investigations and that the results were not to Plaintiffs' liking does not demonstrate that SFSU was deliberately indifferent or that its conduct in the investigations was clearly unreasonable.

Plaintiffs have no answer to the arguments that "[a]n aggrieved party is not entitled to the precise remedy that he or she would prefer," *Oden*, 440 F.3d at 1089, and that the Ninth Circuit has already held that a delay in conducting disciplinary proceedings, even in contravention of an institution's policy, did not support a finding of deliberate indifference, *see id.* (nine-month delay was insufficient to "permit an inference that the delay was a deliberate attempt to sabotage Plaintiff's complaint or its orderly resolution"). Plaintiffs would simply have this Court disregard the Supreme Court's instruction that "courts should refrain from second-guessing the disciplinary decisions made by school administrators." *Davis*, 526 U.S. at 648; *see also Felber*, 851 F. Supp. 2d at 1188 ("That the University may not have acted as plaintiffs would prefer does not rise to deliberate indifference." (internal quotation marks omitted)).

Finally, the University's alleged deliberate indifference must, to support a Title VI claim, have a "concrete, negative effect on [the plaintiff's] ability to receive an education." *Davis*, 526 U.S. at 654. To rise to the level of such deprivation, the discrimination "must have a concrete, negative effect on the victims' education, such as creating disparately hostile educational environment relative to [the victim's] peer, forcing the student to change his or her study habits or to move to another district, or lowering the student's grades." *Fennell ex rel. Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 410 (5th Cir. 2015) (internal quotation marks and citations omitted) (collecting cases).

Plaintiffs make no argument as to how events occurring at the Mayor Barkat speech or Hillel's exclusion from the Know Your Rights Fair could have denied Plaintiffs access to educational opportunities. *See Felber*, 851 F. Supp. 2d at 1188 ("Despite the fact the Sproul Plaza likely serves as an important campus thoroughfare and gathering place, it is not even clear

that activities on Sproul Plaza or at Sather Gate necessarily would significantly impede any student's access to the educational services offered by the University, regardless of the nature of those activities."). And the allegations that a few of the Plaintiffs skipped class or felt harassed on a few occasions are simply insufficient to plead a denial of access to education. Fundamentally, "[f]inding the harassment pervasive means that the challenged incidents are more than episodic; they must be sufficiently continuous and concerted." *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 745 (2d Cir. 2003) (internal quotation marks omitted); *see also Gabrielle M. ex rel. Stanley M. v. Park Forest-Chi. Heights Sch. Dist.163*, 315 F.3d 817, 823 (7th Cir. 2003) (finding no evidence that plaintiff was denied access to education because "[a]lthough she was diagnosed with some psychological problems, the record show[ed] that her grades remained steady and her absenteeism from school did not increase"); *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003) (holding that facts "[fell] short of demonstrating a systemic effect of denying equal access to an educational program or activity" where students' grades did not suffer and their teachers did not observe any change in their classroom demeanor). Plaintiffs' minimal allegations fail to meet this standard.

E. Plaintiff Mandel's allegations are based on his time as a student.

"It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000). In their Opposition, Plaintiffs argue for the first time that Plaintiff Mandel "is an active alumnus who still lives in the Bay Area and continues to frequent on-campus events open to the public, including those focusing on the interests of Jewish students and those offered by Hillel." (Opp. 24-25.) Plaintiffs purport to cite to portions of the FAC supporting that statement, but Mandel's name is nowhere to be found there except in relation to the Mayor Barkat event and the Know Your Rights Fair. (FAC ¶¶ 151-154, 197-227.) Because Mandel's allegations are limited to the time during which he was a student on campus, he lacks standing to seek declaratory and injunctive relief now that he has graduated.

III. CONCLUSION

For the reasons set forth above, and because affording Plaintiffs yet another attempt to cure the deficiencies in their pleadings would be futile, all of Plaintiffs' claims against Defendants should be dismissed with prejudice.

DATED: October 25, 2017

Respectfully submitted,

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